BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMIE VICK	)	
Claimant	)	
	)	
VS.	)	
	)	
STATE OF KANSAS	)	
Respondent	)	Docket No. **1,033,888**
	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Both parties requested review of the March 14, 2012 Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on June 20, 2012.

APPEARANCES

Dennis L. Horner of Kansas City, Kansas, appeared for the claimant. Bryce D. Benedict of Topeka, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

It was undisputed claimant suffered a fall at work and injured her left knee. During her hospitalization following knee surgery the claimant fell in the restroom and alleged she injured her back and wrist. In the alternative, claimant argued she suffered permanent impairment to her back from an antalgic gait due to her knee injury. Consequently, claimant argued she suffered a whole person permanent impairment and was entitled to compensation pursuant to K.S.A. 44-510e. Respondent argued claimant did not injure her back in the fall and should be limited to compensation pursuant to K.S.A. 44-510d. And

respondent further argued claimant did not meet her burden of proof to establish the percentage of permanent impairment to her knee.

The Administrative Law Judge (ALJ) determined claimant failed to meet her burden of proof that she suffered a work-related injury to her back either in the fall at the hospital or from an antalgic gait. The ALJ awarded claimant compensation for a 50 percent functional impairment to her left knee.

Claimant requested review of the nature and extent of disability. Claimant argues the ALJ erred in failing to compensate her for the injuries and permanent impairment to her low back.

Respondent requests review of whether claimant has sustained her burden of proof that she has any functional impairment. Respondent agrees with the ALJ that the claimant has failed to sustain her burden of proof that she suffered an injury to her low back. Respondent disputes, however, that claimant has a permanent injury to her left knee and argues she failed to present competent evidence regarding the functional impairment to her left knee.

The issue for Board determination is the nature and extent of disability. Specifically, whether claimant suffered a permanent injury to her low back which would entitle her to compensation pursuant to K.S.A. 44-510e or whether her compensation should be limited to a scheduled disability to her left knee pursuant to K.S.A. 44-510d and, if so, whether she met her burden of proof to establish the percentage of that disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

As previously noted, the first issue for Board determination is whether claimant suffered a permanent injury to her back which would entitle her to compensation pursuant to K.S.A. 44-510e.

Briefly stated, claimant was a mental health technician at the Osawatomie State Hospital. On February 1, 2007, she was dealing with a combative patient who knocked her down. She landed on her head and left knee. She sought treatment and underwent two surgeries on her left knee. Neither surgery gave her any relief.

Claimant was then referred to Dr. Daniel Stechschulte, who performed a third surgery on her left knee on May 19, 2008, at the Kansas City Orthopedic Institute. After the surgery, the nurses assisted her to the restroom. They left her alone in the restroom, and she sat down. When she tried to stand back up, her legs gave way and she fell. Her

back landed on the rim of the toilet, and she also injured her right wrist. The nurses heard her fall and came right back to the restroom. Claimant told the nurses that her wrist and back were hurt. Claimant did not receive any treatment for her back and testified that the nurses told her to wait to see what her pain would be later. No one from the hospital asked her to fill out a report on the fall.

Kyle Bledsoe, a friend of claimant, corroborated her testimony that she fell while in the bathroom during her May 2008 hospitalization. He testified that he overheard claimant tell the nurses that she fell and hit her head and back and that her back was hurting.

Claimant was in the hospital about three days. She was seen by Dr. Stechschulte while she was still in the hospital. She testified that she told Dr. Stechschulte about her fall in the restroom and that the nurses had told her to wait before doing anything about her back. She further testified Dr. Stechschulte agreed with the nurses and told claimant to let him know if she was still having pain at her follow-up appointment.

Claimant testified that she discussed her back pain with Dr. Stechschulte during her follow-up appointments. She testified that he told her the reason for her back pain could be the change in her gait as a result of her surgeries. He did not want to give her any treatment for her back. Claimant stated that she did have an altered gait from February 1, 2007, through the time she was seeing Dr. Stechschulte. Claimant further testified that she told Dr. Stechschulte about her back pain at every office visit.

But Dr. Stechschulte's office note from his visit with claimant on June 17, 2008, noted claimant complained of right wrist pain from her fall at the hospital. And again on June 24, 2008, claimant complained of continuing right wrist pain and the doctor had x-rays taken of the wrist. On July 1, 2008, the office notes indicate persistent right wrist pain that was improving. But during this time period there was no mention of back pain from the fall in the hospital. Dr. Stechschulte could not recall claimant complaining of back pain from the hospital fall. Dr. Stechschulte testified:

> Q. Okay. In the weeks or months following her surgery in 2008, did she make you aware that she had injured her back in a fall in the hospital but you neglected to make any referral for treatment of such an injury?
>
> A. Not that I recall.
>
> Q. Okay. If you have a patient who does report such an injury -- first of all, do you treat backs?
>
> A. No.
>
> Q. All right. So what is your practice if you have a patient who tells you that she had an injury such as Ms. Vick is alleging regarding her back?

> A. I would try to get that patient evaluated by somebody who takes care of back problems.
>
> Q. Okay. Did you make such an evaluation in Ms. Vick's case?
>
> A. No.[1]

Claimant was seen by Dr. John Pazell on December 17, 2008, at the request of claimant's attorney. Claimant told Dr. Pazell her major complaints regarding her left knee. Dr. Pazell's report does not mention a history of a fall in May 2008. His report indicates that claimant complained of problems with her spine that she attributed to her change in gait. He recommended that claimant be evaluated for her spine problem.

Claimant was seen by Dr. Vito Carabetta on February 12, 2009. Her chief complaint was low back pain. She told Dr. Carabetta that her back pain began following her fall in May 2008. Dr. Carabetta's report notes that in his review of the hospital records, he did not find any mention of claimant's back, but the records did document her right wrist pain incurred in her fall at the hospital. Dr. Carabetta opined that further evaluation and treatment of claimant's back would be appropriate, but because claimant was pregnant at the time of his examination, he noted that any diagnostic work-up would need to be delayed until after she had delivered her child.

Dr. Carabetta did not believe that claimant's back problems were a result of an altered gait. Although he stated the hospital records were devoid of any mention of claimant's back, he stated in his initial report:

> The question of causation, as presented by the patient, would suggest that the onset of the back pain would be a complication of the event that occurred, namely the slip and fall in the bathroom, and this would be related to her original knee problems.[2]

But when Dr. Carabetta testified he agreed that if claimant had injured her back in a traumatic fall as she described he would have expected her to have substantial pain with ongoing complaints after the incident. And the fact claimant described the fall at the hospital as the cause of her back problems when she met with Dr. Pazell the second time caused Dr. Carabetta to wonder why that incident was not mentioned in claimant's first visit. That discrepancy caused Dr. Carabetta to view claimant in a negative light. Dr. Carabetta again indicated that he would have expected claimant to complain to the physicians on an ongoing basis after the fall had it caused her back pain and the fact she

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[1] Stechschulte Depo. at 14-15.

[2] P.H. Trans.(Nov. 30, 2009), Cl. Ex. 2 at 4.

was medicated could have perhaps explained her failure to mention the fall but for the fact that she did complain about the right wrist pain from the fall.

Claimant later received treatment for her back following a Board Order from an appeal from a preliminary hearing. Those treating physicians were simply provided the history of back pain from the fall at the hospital.

The ALJ analyzed the evidence in the following fashion:

> The conclusion supported by the evidence is that the claimant did not bring up the notion of hurting her back in the May 19, 2008 fall to any physician until February 12, 2009, when she stated it to Dr. Carabetta. It is highly inconsistent the claimant would have suffered back pain that arose from the fall for almost nine months before mentioning that fact to a doctor, not even her own chosen physician whom she consulted about back pain. This inconsistency and an MRI exposing only natural degenerative changes in her back showed the back pain probably started long after the fall and was not caused by the fall.
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> Some of [the] questions asked in the record raised a possibility the claimant hurt her back from an altered gait, which could also be a direct natural consequence of the knee injury. All of the physicians who testified acknowledged, theoretically, that altered gait can cause an injury to the back. However, no physician testified the claimant's back was injured that way.
>
> Dr. Stechschulte noted the claimant having an antalgic gait, but he recorded no evidence of a back injury. Neither Dr. Zarr nor Dr. Carabetta noted a gait alteration, and Dr. Carabetta specifically testified he did not think the claimant's back injury resulted from her gait. Dr. Bieri, as noted, attributed the claimant's back pain to the hospital fall. Finally, when asked on direct examination if she notices a limp or gait abnormality, the claimant answered, "I don't, but everybody else around me does." One would think if the claimant limped so badly she hurt her back, the claimant would have noticed a limp. The record lacked credible evidence of a back injury due to altered gait, either.
>
> The preponderance of the evidence showed an injury only to the left knee, a scheduled injury under the K.S.A. 44-510d injury schedule at the 200 week level.[3]

The Board agrees and affirms.

Respondent next argues that claimant failed to meet her burden of proof to establish the percentage of impairment suffered to her left knee. Respondent argues that the surgery performed by Dr. Stechschulte was not a knee replacement and Dr. Bieri based

[3] ALJ Award (Mar. 14, 2012) at 5.

his rating upon the table in the AMA *Guides*[4] which provides a rating for a knee replacement.

The ALJ addressed the respondent's argument in the following fashion:

> The respondent argued Dr. Bieri's rating opinion was inaccurate because the claimant did not have a knee replacement. It is true the claimant did not undergo a complete replacement of the knee joint, but parts of her knee joint were artificially enhanced. Dr. Bieri's use of Table 66 did not seem completely off point, and no better rating method under the *Guides* was identified by any other physician. The court adopts Dr. Bieri's 50% rating.

Dr. Stechschulte described the procedure performed on claimant as a type of arthroplasty and a knee replacement is another type of arthroplasty. Dr. Stechschulte testified:

> Q. Okay. Arthroplasty, is that the fancy name for a knee replacement?
>
> A. It could be, yes.
>
> Q. Okay.
>
> A. I don't mean to be evasive. She had a type of arthroplasty done. And a knee replacement is another type of arthroplasty.[5]

Simply stated, Dr. Bieri's use of table 66 in the AMA *Guides* was not challenged in this record by any physician or upon cross examination. And Dr. Stechschulte's comments establish the procedure performed on claimant's left knee was a type of arthroplasty. The Board affirms the ALJ's finding claimant met her burden of proof to establish she suffered a 50 percent functional impairment to her left knee.

Finally, it should be noted that the ALJ awarded claimant future medical because she may need additional knee surgery in the future. The ALJ cited K.S.A. 2011 Supp. 44-510h(e). K.S.A. 44-510h, as amended effective May 15, 2011, is not applicable to this claim because that provision was not in effect when claimant sustained her accidental injuries on February 1, 2007, and it may not be retroactively applied to this claim. The amended version of K.S.A. 44-510h affects the substantive rights of the parties. Clearly, the amended statute is not intended to make a mere procedural change. There is nothing in the language of the New Act which suggests that the legislature intended K.S.A. 2011 Supp. 44-510h(e) to apply retroactively. On the contrary, as noted by our Supreme Court

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[4] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

[5] Stechschulte Depo. at 26.

in *Bryant*[6], only one provision of the New Act is specifically given retroactive application, K.S.A. 44-529(c). Had the legislature intended that K.S.A. 2011 Supp. 44-510h(e) apply to claims involving accidents before May 15, 2011, it easily could have included language to accomplish that end. Consequently, claimant is entitled to future medical upon proper application to the Director.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[7] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated March 14, 2012, is modified to reflect claimant is entitled to future medical upon application and affirmed in all other respects.

IT IS SO ORDERED.

Dated this 13th day of September, 2012.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

e: Dennis L. Horner, Attorney for Claimant, hornerduckers@yahoo.com
Bryce D. Benedict, Attorney for Respondent, bbenedict@kdheks.gov
Kenneth J. Hursh, Administrative Law Judge

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[6] *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2011).

[7] K.S.A. 2011 Supp. 44-555c(k).